

IN THE
Supreme Court of United States

OCTOBER TERM, 1916.

THE ARIZONA COPPER COM- PANY, Limited, v. RICHARD BRAY, <i>Defendant in Error.</i>	}	No. 478.
<i>Plaintiff in Error,</i>		

**MOTION TO DISMISS AND TO AFFIRM
AND BRIEF IN SUPPORT THEREOF.**

MOTION.

Comes now the defendant in error above named and moves this Honorable Court to dismiss the writ of error and appeal herein, upon the following grounds:

(1) For want of jurisdiction in this court to entertain said appeal.

(2) Because no appeal herein was taken or perfected within the time required by law, in that the order allowing the writ of error was on March 4, 1916, and the record herein was not filed in this court until May 9, 1916.

(3) Because the appellant claims as ground for appeal that the Employers' Liability Law, Chap. 6 of Title 14 Revised Statutes of Arizona, 1913, is in violation of Sections 5 and 7 of Article 18 of the Constitution of Arizona, which claim is unfounded, frivolous and presents no question for the consideration of this court.

(4) Because the appellant claims that the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, violates the fourteenth amendment of the Constitution of the United States, which is its sole excuse for this appeal, and which contention is frivolous and without merit, and on other grounds stated in the annexed brief.

That said defendant in error also moves this court to affirm the judgment of the district court upon the following grounds:

(a) On the grounds stated in No. 3 in above motion to dismiss, and on the further grounds, to-wit:

(b) That under the provisions of the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, in the United

States District Court for the District of Arizona, the plaintiff below recovered a judgment against the defendant for a personal injury, and that under the provisions of Sec. 238 of the Judicial Code of the United States the plaintiff in error has prosecuted an appeal from that judgment to this court under the claim that said Employers' Liability Law is in violation of the fourteenth amendment of the Constitution of the United States, which claim is untenable, without merit and is the sole excuse for the invocation of the appellate jurisdiction of this court, which in fact does not involve the construction of said Arizona law, and that only general questions of a non-federal character are presented for review, and no plain error, or error at all, was committed by the court below in trying the case, and that the questions on which the decision of the cause depend are so frivolous as not to require argument, and upon the further grounds stated in the annexed brief, and that it is manifest from the record of this cause that the writ is prosecuted only for delay, which is prejudicial to the rights of the defendant in error, in consequence of which the defendant in error respectfully prays that the judgment below be affirmed with damages as prescribed in Rule 23 of this court upon the affirmance of the judgment herein, and with 12 per cent interest as provided for by Sec. 3161 of said Arizona statute, and in the event that said affirmance

be not granted, then defendant in error prays that the cause be transferred for hearing to a summary docket.

Respectfully submitted,

FRANK H. HEREFORD AND
~~FRANK E. CUBLEY,~~

Tucson, Arizona,
Attorneys for Defendant in Error.

Sirs:

Please take notice that the foregoing motions will be submitted to the court at the City of Washington, in the District of Columbia, on the 9th day of October, 1916, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours truly,
FRANK H. HEREFORD AND
~~FRANK E. CUBLEY,~~

Tucson, Arizona,
Attorneys for Defendant in Error.

Dated this day of August, 1916.

To

W. C. McFARLAND AND
H. A. ELLIOTT,

Attorneys for Plaintiff in Error,
Clifton, Arizona.

IN THE
Supreme Court of United States

THE ARIZONA COPPER COM- PANY, Limited,	}	
<i>Plaintiff in Error,</i>		
v.		
RICHARD BRAY,	}	No. 478.
<i>Defendant in Error.</i>		

**MOTION TO DISMISS AND TO AFFIRM
AND BRIEF IN SUPPORT THEREOF.**

STATEMENT.

This is a motion under Rule VI to dismiss the writ of error and appeal, and to affirm the judgment herein.

The cause is here upon a writ of error directed to the District Court of the United States for the District of Arizona to review a judgment entered in said District Court.

The action was brought by Richard Bray as the plaintiff in the trial court against the plaintiff in error here, under the Employers' Liability Law, Chap. 6 of Title 14, Revised Statutes of Arizona, 1913, to recover damages for personal injuries received by him at Morenci, Arizona, while in the employ of plaintiff in error as a miner, on August 4, 1914, and resulted in a judgment in favor of plaintiff below upon a verdict in the sum of \$9,184.55.

The writ of error was allowed on March 4, 1916, transcript of record, p. 123, and the record was filed in this court on May 9, 1916, more than sixty days had expired after writ allowed before record was filed.

CONSTITUTION OF ARIZONA.

Sections 4, 5, 6 and 7, of Article 18 of Constitution of Arizona, are as follows:

"Sec. 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

Sec. 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and

the amount recovered shall not be subject to any statutory limitation.

Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law*, by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."

The Employers' Liability Law, approved May 24, 1912, now known as Chapter 6 of Title 14, Revised Statutes of Arizona, 1913, so far as the same has any bearing on the questions at bar, is as follows:

"Sec. 3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the state constitution.

3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazard-

ous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, electric railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel framework.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions, informs all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee; and, if none, then to his personal representative, for the benefit of the estate of the deceased.

3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

Point I.

It is obvious that the above statute conforms to the provisions of Sec. 7, of Article 18 of the

Constitution of Arizona, and is not open to the question that it violates the fourteenth amendment of United States Constitution. On such question an appeal was dismissed in case of *East-erling Lumber Company v. Pierce*, 235 U. S. 380, 59 L. ed. 279; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364; *Brolan v. United States*, 236 U. S. 216, 59 L. ed. 545.

Point II.

Sec. 5 of Article 18 of Constitution of Arizona has no application to the Employers' Liability Law, but pertains to common law actions for negligence.

Consolidated Arizona Smelting Co. v. Ujack, 139 Pac. (Ariz.) 465.

Point III.

Of course the record was not filed in this court within the time required by law, and whether the court will dismiss for that reason or not is discretionary.

The real excuse for this case being in this court is the claim that the Arizona employers' liability act offends against the fourteenth amendment of the Constitution of the United States. On the slightest inspection this claim is so wholly wanting in merit as to be frivolous, and for that

reason the court may decline to take jurisdiction and dismiss the appeal as was done in cases—

Brolan v. United States, 236 U. S. 216;
Goodrich v. Ferris, 214 U. S. 71, 53 L. ed. 914;
Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239;
Easterling Lbr. Co. v. Pierce, 235 U. S. 279;
Vandellia Ry. Co. v. Stillwell, 36 Sup. Ct. 445.

The same character of statute has been so many times before this court for consideration and before so many other courts that all questions as to their constitutionality may now be regarded as well settled, and furnishes no excuse for an appeal to this court on that question, and that such statutes do not offend against the fourteenth amendment of United States Constitution has been many times declared by this court.

Northern Pacific Railway Co. v. Meese, 239 U. S. 614;
Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279;
Jeffrey v. Blagg, 235 U. S. 571, 59 L. ed. 364;
Chicago etc. v. McGuire, 219 U. S. 549, 55 L. ed. 328;
Chicago Ind. L. Ry. Co. v. Hacket, 228 U. S. 559, 57 L. ed. 966;
Western Indemnity v. Pillsbury, 151 Pac. (Cal.) 398.

We will briefly consider appellant's assignment of errors (Tr. pp. 113-117).

Assignment I is entirely without merit.

Assignment of Error II claims that the Arizona Employers' Liability Law is in violation of fourteenth amendment of United States Constitution, by subjecting appellant to unlimited liability without fault. This contention is answered by the above authorities and such claim is without merit. It is no objection to the statute that it deprives the appellant of property without its fault.

See *Stertz v. Industrial Insurance Commission*, 158 Pacific Rep. 256 (pamphlet July 24, 1916, advance sheet), where authorities are collated;

Chicago, Rock Island & Pac. Ry. Co. v. Zerneck, 183 U. S. 582, 46 L. ed. 339;
State v. Clausen, 65 Wash. 156, 117 Pac. 1101;

Western Indemnity v. Pillsbury, 151 Pac. 398.

Because the employer's liability act places no restrictions as to the amount of damages recoverable is no valid objection, and therefor no limitation applies except that of the damages actually sustained.

Sweet v. Chicago etc. R. Co., 157 Wis. 400, 147 N. W. 1054;

Devine v. Chicago etc. R. Co., 266 Ill. 248, 107 N. E. 595.

ASSIGNED ERROR III.

This assignment, like the former, is without merit. The court was right in overruling appellant's special demurrer No. 2, because the question of contributory negligence is not in this case. As we have seen, the Arizona statute makes the defendant liable without fault. The language of the Arizona statute is:

*"Any employer, * * * shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured."*

The question is, was the defendant in error guilty of negligence and did his negligence cause his injury? If it did, he cannot recover. If plaintiff below was not guilty of negligence he was entitled to verdict whether defendant was guilty of negligence or not, and that question was properly presented to the jury in the court's charge. What is the use in giving a charge on contributory negligence when the defendant is liable, whether it was, or was not, guilty of negligence? Under the Arizona law the only question the court could instruct the jury on was whether or not the plaintiff's injuries were caused by his own negligence, and not on the negligence of the defendant, be-

cause the defendant is liable for an accident due to a condition of such occupation, in such hazardous occupation, without fault. Under this statute the question of the defendant's negligence is entirely removed, and the doctrine of comparative negligence is taken out of the statute by virtue of the provisions of Sec. 7 of Article 18 of Arizona Constitution.

"Contributory negligence on the part of plaintiff necessarily assumes negligence on the part of defendant."

29 Cyc. 506, citing cases in note 44, and
Hammer v. Railroad Co., 128 Ky. 486, 108
 S. W. 885;
Lime Co. v. Affleck, 115 Va. 643, 79 S. E.
 1054;
Ariz. East. R. Co. v. Bryan, 157 Pac. 380,
 first column.

ASSIGNED ERROR IV.

The court was right in overruling plaintiff in error's special demurrer No. 7, because the doctrine of assumption of risk has been removed by the Arizona statute and Sec. 7 of Art. 18 of its constitution, and the employer rendered liable for an injury caused by an accident due to a condition of such occupation in a hazardous employment named in the statute.

Stertz v. Industrial Ins. Com., 158 Pac.
 (Wash.) 260 (pamphlet);
Western Indemnity v. Pillsbury, 151 Pac.
 (Cal. 398.

ASSIGNED ERROR V.

This assignment is without merit.

ASSIGNED ERROR VI.

The court did not err in striking out that part of the answer set out in assigned error VI, which states that plaintiff's injuries arose from his "*own want of care*," because the statute uses the word "*negligence*," and not "*care*," and the defense of negligence was left to defendant, and further, it was incumbent on plaintiff to make out, by a preponderance of the evidence, that his injuries were not caused by his own negligence, and the court so instructed the jury (Tr. p. 103).

ASSIGNED ERROR VII.

The court was right in sustaining a demurrer to that part of the answer, paragraph 4 on page 6, because it set up the doctrine of assumption of risk, and that defense has been removed by the Arizona statute. What has been said under assigned errors III and IV, *supra*, is applicable as an answer to assigned error VII.

ASSIGNED ERROR VIII.

The court was right in sustaining an objection to the question asked Mr. Bray as to what he told Doctor Goodrich, because it was shown by the evidence that the relation of physician

and patient existed between Mr. Bray and Doctor Goodrich, and such conversation was privileged (Tr. p. 30), which discloses a different question than the one embodied in said assigned error VIII, which is not found in the record. Further, there was no exception taken to ruling of the court (Tr. p. 30).

A patient could not be compelled to disclose communications which his physician would not be permitted to disclose.

Verdelli v. Gray's Harbor Com. Co., 115 Cal. 517.

Giving testimony by the patient as to the communications is a waiver of the privilege and is a consent that the physician may testify.

Armstrong v. Topeka Ry. Co., 144 Pac. (Cal.) 850;

Arizona & N. M. R. Co. v. Clark, 235 U. S. 669, 59 L. Ed. 415, on the Arizona statute.

ASSIGNED ERROR IX.

This assigned error, like the preceding one, is not in the record, and if it were, it is without merit.

ASSIGNED ERROR X.

It will be seen by the record (Tr. p. 70), that no exception was taken to the ruling of the court

in sustaining an objection to the question. Further, what was or was not, the common practice was unimportant evidence.

ASSIGNED ERROR XI.

The assignment is too general to present any question for review, further, all testimony is not before the court, the depositions taken at Salt Lake are not made a part of the bill of exceptions.

ASSIGNED ERROR XII.

This assigned error is without merit. The definition given by the court as to what constituted "conditions of employment" is about correct, and certainly did the appellant no harm.

ASSIGNED ERROR XIII.

This assignment is without merit, and further, all testimony is not before the court.

ASSIGNED ERRORS XIV, XV, XVI.

are without merit and are entirely frivolous.

Since, therefore, it appears that no constitutional question is presented and that no plain error is disclosed by the record, that the character of the case is such as not to require or to be entitled to receive from the court more than a summary inspection and examination of the record,

and that such examination and inspection, even if extended to the most searching scrutiny, would inevitably result in a dismissal or affirmance of the judgment below, we respectfully submit that the cause should be dismissed or the judgment of the lower court should be affirmed.

Should these motions be denied, we respectfully submit that this cause is of such a character as not to justify extended argument, it should be transferred for hearing to the summary docket. Since it clearly appears that this writ is prosecuted only for delay to the prejudice of the defendant in error, and is in reality frivolous, we respectfully submit that damages should be awarded to the defendant in error pursuant to Rule 23 of this court, and that 12 per cent interest be added to the judgment from the time of the filing of the complaint herein, June 17, 1915, as provided for by the provisions of Sec. 3161, Revised Statutes of Arizona, 1913.

Respectfully submitted,

FRANK H. HEREFORD ~~AND~~

~~FRANK E. CULLEY,~~

Tucson, Arizona,

Attorneys for Defendant in Error.



FILE

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JAMES D. MA

Supreme Court of the United States.

OCTOBER TERM, 1916.

No.

13221

THE ARIZONA COPPER COMPANY, LIMITED,
Plaintiff in Error,

v.

RICHARD BRAY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,
on motion to dismiss and affirm.

JOHN A. GARVER,
W. C. MCFARLAND,
Counsel for Plaintiff in Error.



IN THE
Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 478.

THE ARIZONA COPPER COMPANY,
LIMITED,

Plaintiff in error,

v.

RICHARD BRAY,
Defendant in error.

Brief for plaintiff in
error, on motion to
dismiss and affirm.

Motion by defendant in error to dismiss and affirm, under
Rule 6.

Statement.

This action was brought by the defendant in error, in the United States District Court for the District of Arizona, to recover damages for personal injuries alleged to have been sustained by him while working in the defendant's mine. A verdict was rendered in his favor for \$9,000.

As stated in the brief for the defendant in error (p. 6), the action was brought under the Employers' Liability Law of Arizona, which makes employers in certain hazardous occupa-

tions, including mining, liable, *to an unlimited extent*, for injuries sustained as the result of an accident due to conditions of the occupation, where the injury has not been due to the negligence of the injured employee. The liability is imposed irrespective of any negligence or fault on the part of the employer.

The provisions of the Arizona Constitution and of the Employers' Liability Law are set forth in the brief for the defendant in error, with the exception of one very important Section of the Law (Sec. 3159), permitting the defenses of assumption of risk and contributory negligence, which will be hereafter referred to (*post*, p. 11). These defenses were set up in the answer, but were stricken out by the Court; and exceptions were duly taken (Record, pp. 8-10).

A demurrer to the complaint, on the ground that the Employers' Liability Act was unconstitutional, because it deprived the Company of its property without due process of law and of the equal protection of the law, under the Fourteenth Amendment, was overruled; and an exception was duly taken (Record, pp. 5, 10). The same ground was urged upon motions for the dismissal of the complaint, when the case was moved for trial and at the close of the entire case. The motions were denied and exceptions taken (Record, pp. 12, 110); and this ground was expressly relied upon by the plaintiff in error in the assignments of error (Record, p. 113).

POINTS.

FIRST.

This Court has jurisdiction.

I. An appeal lies directly to this Court from the District Court, where the case involves the application of the Constitution of the United States.

Judicial Code, Sec. 238.

II. Counsel for the defendant in error, in their notice of motion, concede (p. 2) that a constitutional question is asserted by the plaintiff in error and merely urge that the question is frivolous; and this concession is also made in their brief (p. 11).

III. The plaintiff in error specifically asserted a right under the Fourteenth Amendment, which the Court below decided adversely to his contention (Record, pp. 5, 10, 12, 110).

Section 1230 of the Revised Statutes of Arizona (1913) provides :

“ Upon an appeal from a final judgment, the Supreme Court may review any intermediate order involving the merits and necessarily affecting the judgment.”

This Court will follow the State practice, in the case of appeals in actions at law.

Fitzpatrick v. Flannagan, 106 U. S., 648.

And, independently of the State practice, so long as the record shows that the constitutional question was raised and considered by the lower court, even though that appears only in the opinion of the court, this Court will assume jurisdiction.

Loeb v. Columbia Township Trustees, 179 U. S.,
472, 477.

SECOND.

Alleged irregularity in the record.

I. Counsel for defendant in error are mistaken in their assertion that the record was not filed in this Court until May 9, 1916. While a statement to that effect appears upon the printed record, as a matter of fact the record was received by the Clerk of the Court on April 29, 1916.

II. Even, however, if there had been a ten days' delay in filing the record, it would afford no ground of complaint now, inasmuch as the record was duly completed and printed months before the opening day of the session. A motion to dismiss will not be seriously entertained by this Court upon such facts.

Sparrow v. Strong, 3 Wall., 97, 103.

The defendant in error should himself have proceeded regularly, under Rule 9, if he desired to make a motion to dismiss on the ground of such a technical irregularity.

Southern Pine Co. v. Ward, 208 U. S., 126, 136.

THIRD.

The constitutional question a novel one and of great importance.

I. Employers' Liability Acts and Workmen's Compensation Acts are now in existence in many of the States; and they have also been adopted by the Congress of the United States. They are for the most part of recent origin, scarcely any of them dating back more than six or eight years, while

many of them have taken effect only within the past three or four years. With the limitations and restrictions and optional or reciprocal provisions contained in them, they have been very generally recognized as valid exercises of the police power of the state. But a statute which imposes an *unlimited* liability upon an employer, without fault on his part and without any attempt at mutuality for the protection of both employer and employed, has never yet, so far as we are aware, been passed upon by this Court or held valid by any State court of last resort. In the case of the Federal Employers' Liability Act (35 Stat. L. 65), negligence on the part of the employer must be established; and in the case of the Federal Compensation Law (35 Stat. L. 556), the liability is strictly limited to a year's wages.

The theory of nearly all the legislation on the subject has been that, in the interest of society, hazardous occupations should themselves be charged with the reasonable burden of sustaining the inevitable loss resulting from the inherent risks of the business, which no ordinary care or foresight can guard against, and that a liability or insurance fund should be created by a tax upon the business, which, on the one hand, will afford substantial compensation to the injured employee, and, on the other hand, will protect the employer from uncertain and possibly ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and of all other workmen employed by him, but of society generally. In all legislation of that kind which thus far has been upheld, there is some mutuality in the apportionment of the risk, some attempt to reach a scientific basis of compensation, established, usually, upon a percentage of the impairment of wages, and some recognition of maximum and minimum compensation, which will enable the employer to conduct his business on an approximate estimate of the risk that he is obliged to assume. But legislation which exposes the innocent employer to the mere caprice and prejudices of different juries,

where nothing is certain except that no two juries will bring in the same verdict upon the same state of facts, not only has the effect of depriving the employer of his property without due process of law, but, in its nature, must be prejudicial to the best interests of society, as tending to make capital shrink from employment in occupations where such uncertainties exist.

The magnitude and gravity of the subject are well exemplified in the extended discussion devoted to it by the New York Court of Appeals in the famous case of *Ives v. South Buffalo Ry. Co.* (201 N. Y., 271), in which the decision of the Court was unanimous, and was concurred in in a separate opinion by CULLEN, C. J., whose great ability and exceptional learning in the realm of constitutional law are widely recognized. The reasoning in that case is directly applicable to the case at bar, on the question of the power of the legislature to impose liability without fault; but the liability imposed by the statute there under consideration was not unlimited, so that the Arizona statute is a much more flagrant violation of constitutional limitations than the New York statute, which was declared void.

The distinction between a case where the law places an unlimited liability on the innocent employer and a case where a new and exclusive method of compensation for industrial accidents is provided by a system of compulsory insurance, the amount of compensation being strictly limited and dependent upon the degree of injury, is well exemplified in the very careful Workmen's Compensation Law which was passed by the New York Legislature, after an amendment to the State Constitution, made as a result of the decision in the *Ives* case (L. 1913, Ch. 816). This statute has been upheld by the Court of Appeals, in a decision which points out clearly the principles on which legislation of this kind can be sustained and the limitations which must be placed upon it in order to render it constitutional.

Jensen v. Southern Pacific Co., 215 N. Y., 514.

II. While the entire subject of appropriate legislation to provide against the hardships resulting from accidents which occur in hazardous occupations, without fault, is of very recent origin, its importance is shown by the careful and extended discussion which has been devoted to it by all the state courts which have had occasion to consider any of the questions involved. As will be shown in the next Point, this Court has passed on the subject only incidentally; and none of the state courts have had presented to them a statute similar to the one involved in this case.

Such legislation marks a distinct departure from the well settled and long established principles of the common law; and, until this Court has passed upon it in its various phases, it is assuredly not frivolous for an employer who is vitally interested, to request a hearing upon his contention that the law deprives him of his constitutional rights. In the case of the plaintiff in error, it is not merely the judgment in this particular case, nor the larger judgment in a similar case now before the Court (No. 477), but the continuous liability to which it will be exposed, if the statute and constitutional provision should be held to be valid.

FOURTH.

No previous decision by this Court on the subject.

I. No previous decision upon the point now presented has been rendered by this Court, so far as we have been able to ascertain; and, although Workmen's Compensation and Employers' Liability Laws have been the subject of widespread discussion during the past few years in nearly all the courts of the country, none of the courts of last resort have passed upon the question involved in the present case.

That is doubtless due to the fact that no other legislation has yet gone to the extreme extent of subjecting an employer to *unlimited* liability, without any fault on his part and without any compensating obligation on the part of the employed. Always, heretofore, it has been a fundamental and sacred principle of our jurisprudence that no one could be subjected to liability for damages without fault of some kind.

Nitro-Glycerine Case, 15 Wall., 524, 527.

The statutes of this kind which have been held valid provide a new and exclusive method, by which persons engaged in certain industries may be compensated for injuries inevitably resulting from the nature of the employment. This unavoidable hazard is met by reciprocal concessions of absolute right by employees as well as employers, including frequently the right to trial by jury. But that is not the method adopted by the Legislature of Arizona. While the Legislature of that State also passed a Workmen's Compensation Law (Rev. Stat. Title 14, Ch. VII), it was made compulsory only upon the employer. The employee is left free to accept the compensation, or to pursue his common law remedy, or to bring an action under the Employers' Liability Act, where, without showing any fault on the part of the employer, he has the absolute right to appeal to the jury for the highest award of damages possible.

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz., 382.

In the present case, the judgment demanded was \$50,000 (Record, p. 3).

II. Various cases are cited in the brief for the defendant in error as controlling; but not one of them is in point, and all of them are readily distinguishable from the present case.

1. The cases holding that it is competent for the legislature to deprive employers of the defenses of

assumption of risk, contributory negligence and negligence of a fellow servant, are obviously not in point, as was shown in the Ives case (201 N. Y., 271, 288-9). The legislature has the undoubted power to impose certain obligations on employers in connection with insurance or protection of their employees ; and refusal to allow these defenses to be made has usually been sustained as a penalty for failing to comply with the legislative regulations.

C. B. & Q. R. Co. v. McGuire, 219 U. S., 549 ;
Chicago, etc. Ry. Co. v. Hackett, 228 U. S., 559 ;
Easterling Lumber Co. v. Pierce, 235 U. S., 380 ;
Jeffrey Manufacturing Co. v. Blagg, 235 U. S., 571.

2. Similar to the foregoing are the cases holding that the legislature may require railroad companies to fence their tracks and may make them liable if they fail to do so.

Missouri Pac. Ry. Co. v. Humes, 115 U. S., 512 ;
Minneapolis Ry. Co. v. Beckwith, 129 U. S., 26.

In the absence of a statutory duty to construct fences, it has been held that legislation which imposes a liability upon railroad companies for injuries to cattle on their tracks is unconstitutional.

Ziegler v. S. & N. Ala. R. R. Co., 58 Ala., 595 ;
Billenberg v. Montana U. Ry. Co., 8 Mont., 271 ;
Jensen v. Railway Co., 6 Utah, 253 ;
Ohio, etc. Ry. Co. v. Lackey, 78 Ill., 271.

The correctness of these latter decisions may be questioned ; because, the very fact that a railroad company has the power of eminent domain and can acquire and operate a strip of land across farms which were previously fenced for the protection of cattle may be held to throw a duty upon the company to provide such protection and to so operate its property as not to

cause injuries to which the adjacent owners were not previously exposed.

3. The recent decisions of the courts of last resort in Washington, California and Texas, upholding the Workmen's Compensation Acts of those States, are not authorities in favor of the Arizona Employers' Liability Law, because they deal with statutes which, like the New York statute previously referred to (*ante*, p. 6), provide graduated systems of compensation for industrial accidents, which are exclusive and compulsory for both employers and employed.

City ex rel. Clausen v. Burr, 65 Wash., 156 ;
Stortz v. Industrial Insurance Commission, 158
 Pac., 256 (Wash., 1916) ;
Western Indemnity Co. v. Pillsbury, 170 Cal., 686 ;
Middleton v. Texas Power & Light Co., 185 S. W.,
 556 (Tex., 1916).

4. The only case in this Court cited by defendant in error, which is even remotely in point, is

Ch., R. I. & Pac. Ry. Co. v. Zerneck, 183 U. S.,
 582.

That was a case where a Nebraska statute made railroad companies, without fault, liable for injuries to passengers. The Court held that this statute had been accepted by the company as part of its charter, which, of course, disposed of the case. But, in the course of its opinion, the Court suggested that the legislation might also be upheld on the theory that, at common law, railroad companies were liable as insurers of goods, and that this was merely an extension of the well recognized principle of the common law to make them insurers of the safety of their passengers. But, as Mr. Justice McKenna pointed out in his opinion in that case, this unlimited liability of railroad companies was the out-

growth of the decision in *Coggs v. Bernard* (2 *Ld. Raym.*, 909) ; and Chief Justice MARSHALL, in *Boyce v. Anderson* (2 *Pet.*, 150), characterized the principle as "one of great rigor," which should not be carried further or applied to new cases.

5. *Northern Pac. Ry. Co. v. Meese*, 239 U. S., 614.

In that case, this court considered only one phase of the Workmen's Compensation Law of Washington, namely, whether it deprived employees of their common law remedy against third parties, when they were injured in the course of their employment. This Court adopted the construction which the Supreme Court of Washington had placed on the statute on this point; but the constitutionality of the statute, as a whole, was not considered. As already pointed out, however (*ante*, p. 10), the Washington statute is entirely unlike the Arizona statute.

FIFTH.

Plaintiff in error deprived by Court below of constitutional defenses.

I. Where this Court has jurisdiction, by reason of the existence of a constitutional question, it will review all the questions of law involved in the case.

Brolan v. United States, 236 U. S., 216.

II. Section 5, of Article 18, of the Arizona Constitution is as follows :

"The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be questions of fact and shall at all times be left to the jury."

III. The plaintiff in error pleaded in his answer the defenses of the assumption of risk and contributory negligence. These defenses were stricken out; and exceptions to the rulings of the Court were duly taken (Record, pp. 8-10).

Counsel for defendant in error state that the very comprehensive and emphatic provision of the Constitution has been held by the Supreme Court of Arizona to apply only to actions at common law, citing

Cons. Ariz. Smelting Co. v. Ujack, 15 Ariz., 383.

As a matter of fact, the question was not even considered in that case, the action being one at common law, and the only question being whether it was barred by an election to accept compensation under the Workmen's Compensation Act (an entirely different statute from the Employers' Liability Law). Even if that case had decided the point, it would be of no importance, because Section 3159 of the Employers' Liability Act expressly provides that these two defenses shall be available in an action brought under that Act.

Section 3159 is as follows :

" In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state constitution ; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

That is the Section which counsel for the defendant in error have omitted from the copy of the Act contained in their brief (pp. 6-10), and which they assume to give in full, "so far as the same has any bearing on the questions at bar" (p. 7)!

IV. In excluding these defenses, the District Court manifestly committed reversible error.

SIXTH.

The cause should not be transferred to the summary docket.

It is probable that the motion to dismiss and affirm was made merely to have the cause transferred for hearing to the summary docket. Owing, however, to the novelty and importance of the constitutional question involved and to the fact that other questions have been raised by the assignments of error, which, with one exception, it has not been thought necessary to discuss in this brief, the motion should be denied unconditionally, so that full time may be allowed for the argument. This is no hardship to the defendant in error, in view of the unusual provision contained in the Arizona statute (Sec. 3161, set forth in the brief for defendant in error, p. 10), requiring the payment of interest at 12% per annum upon any judgment obtained under the Employers' Liability Act, which is affirmed by the appellate court. It may be questioned whether such a severe penalty as this, upon the right of appeal in the case of unlimited liability, does not in itself render the Act void.

SEVENTH.

The motion should be denied.

Washington, October 9, 1916.

JOHN A. GARVER,

W. C. MCFARLAND,

Counsel for plaintiff in error.

**In the Supreme Court
of the United States**

OCTOBER TERM, 1917

**The Arizona Copper Company,
Limited,**

Plaintiff in error,

vs.

Richard Bray,

Defendant in error.

No. 162

BRIEF OF DEFENDANT IN ERROR

This action was commenced in the United States District Court for the District of Arizona at Tucson under Paragraph Six, Title Fourteen, Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law," to recover for injuries received by defendant in

error while in the employ of plaintiff in error in the operation of its mines.

Upon the trial of the case in the District Court at Tucson before a jury, a verdict was returned in favor of defendant in error in the sum of Nine Thousand (\$9,000) Dollars, upon which judgment was entered and from which this appeal was prosecuted.

This case was tried in the lower court immediately following that of Joseph B. Hammer vs. The Arizona Copper Company, Limited, which case was likewise removed to this court by writ of error and was docketed at the October 1916 Term, No. 477, being the case last considered.

The question of primary importance in this case as in the Hammer case, is whether or not the Arizona Employers' Liability Law is constitutionally valid.

As this question is to be determined in the Hammer case, and that determination will necessarily rule in this case and as the questions involved from a constitutional standpoint have been argued in the Hammer case, to reiterate that argument in this case would be but unnecessary burdening of the record, and we therefore submit the validity of the act upon the argument in the Hammer case.

We will proceed, therefore, to consider briefly plaintiff in error's assigned errors other than those touching the validity of the law.

Assignment I is clearly without merit.

Assignment II and III present the constitutional validity of the Arizona law and as heretofore pointed out must necessarily be determined by the decision in the Hammer case.

Contributory negligence was not plead as reduction of damages, and, such being the case, is fully disposed of by the Arizona case, *Superior & Pitts. Cop. Co. v. Tomich*, 165 Pac. 1101.

Assignment IV.

Under this assignment, as under Assignment IV in the Hammer case, complaint is made of the overruling of plaintiff in error's special demurrer by which it was alleged that the injury was caused wholly by and resulted from the **usual** and **ordinary** risks of the employment.

In construing the Arizona law relative to assuming risks the Supreme Court of Arizona in the case of *Inspiration Consolidated Copper Company vs. Mendez*, 19 Ariz.———, 166, Pac. 278, said:

"The statute clearly does not require as a condition of liability that the accident causing the injury proximately resulted from the master's negligence, and it as clearly does exclude as a matter of defense the assumption of all ordinary and extraordinary risks inherent in the occupation. Such risks and dangers as are inherent in the occupation are declared to be unavoidable risks and dangers, and therefore it necessarily follows that the

employee in entering upon his duties does not assume such ordinary inherent risks, although known to him. Such risks as he may assume must be risks and dangers other than risks and dangers inherent in the occupation."

Assignment V is clearly without merit.

Assignment VI is also clearly without merit. If it was intended as an instruction to the effect that defendant in error could not recover if the injury was caused by his own negligence, then it was merely accumulative as the court so instructed the jury. (Transcript of Record, page 103.) If the instruction was asked on any other theory it was improper.

Assignment VII.

This assignment also presents the common law doctrine of assumption of risk which did not arise in this action. This was fully discussed under Assignment IV.

Assignments VIII and IX.

These assignments present questions of privileged communications which have been determined by this court adversely to the contention of plaintiff in error in the case of Arizona & New Mexico Railway Company vs. Clark, 235 U. S. 669, 59 L. ed.———35 Sup. Ct. Rep. 210, L. R. A. 1915 C.

A patient cannot be compelled to disclose communications which his physician is not permitted to disclose.

Verdelli v. Gray's Harbor Com. Co. 115
Cal. 517.

If the patient testify to communication it is a waiver of the privilege and a consent that the physician testify.

Armstrong v. Topeka Ry. Co. 144 Pac.
(Cal.) 850.

Assignment X.

The question complained of by this assignment was clearly immaterial. Apart from what might constitute negligence previous practice in the mine could not in any way affect this action.

Assignment XI is without merit.

Assignment XII.

The instruction complained of under this assignment was a limitation upon the liability of plaintiff in error and was given for its benefit; limiting the liability to all "such situations as could or might be foreseen or such as might in the ordinary course of events come about," and excluding "those extraordinary occurrences or situations which would not naturally be brought about even by the negligence of the employer, and which could not, by the exercise of the highest degree of prudence and foresight, have been foreseen." In other words, the court was but limiting the term, "condition or conditions of employment" for the benefit of plaintiff in error.

Assignment XIII is clearly without merit.

Evidence was introduced by defendant in error showing the exact manner in which the injury was brought about and the court instructed the jury that if the injuries were caused by the negligence of plaintiff himself then he could not recover. (Transcript of Record, Page 103.)

Assignment XIV does not present any question for the consideration of this court.

Assignments XV and XVI are wholly without merit.

Interest on Judgment.

Paragraph 3161, Civil Code of Arizona, 1913, provides that if the judgment of the lower court be sustained by the higher court, then there shall be added by the higher court interest at the rate of twelve (12) per cent. per annum on the amount of such judgment from the date of filing of the complaint in the lower court, which in this case was June 17, 1915. We request that such interest be added in case this judgment is affirmed.

Respectfully submitted,

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